CO-OPERATIVE CENTRAL BANK LTD.

v.

SRI DEVI LEKSHMY AMMA

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
AJAIB SINGH SCJ
[SUPREME COURT CIVIL APPEAL NO. 100 OF 1988]
30 DECEMBER 1989

UNINCORPORATED ASSOCIATIONS: *Loan - Charge - When charge is executed - Whether independent obligation is created - Statutory enforceability - Remedies - Form 16D notice - Section 254 of the National Land Code - Whether mere refusal to pay or failure to pay money which is admittedly due - Is it a 'dispute' - Section 49(2) of the Co-operative Societies Act 1948 - Member v. non-member - Effect of - Defence - Dispute between member borrower and the co-operative society has to be settled - Should it be settled before commencement of action - Whether action premature - Wrong for Judge to dismiss application - Order for stay - Charge executed not loan agreement - Debt not denied - Deeming provision - Whether it affects obligation.*

The respondent was the registered owner of a piece of land. The appellant (CCB) granted a loan of RM100,000 to the respondent's husband. The respondent husband was a member of a co-operative society.

In order to secure the said loan, CCB, executed a first legal charge over the said land in favour of the appellant, which charge was registered. By a term of the said charge the respondent agreed to pay to the appellant on demand, the total amount outstanding together with interest and default interest. The respondent defaulted in the repayment of the loan. A notice in Form 16D under s. 254 of the National Land Code was sent to the respondent.

In the High Court below, the respondent contended that she was not liable until the breach by the member of the co-operative society had been determined and that until the breach had been established, any action against the respondent was premature.

The Judge agreed with this contention. The appellant now appealed.

Held:

[1] Section 49 of the Co-operative Societies Act 1948 had no application in the instant case.

[2] The respondent is not a member of the co-operative society.

[3] The transaction between the appellant and the respondent does not create a dispute which only involves a society and a member.

[4] The charge creates a right on the part of the chargee in the event of default to pay, to exercise the power of sale.

[5] Only the Courts have the powers to make the order for sale and in this case it would be against business efficacy.

[6] It is not a dispute between a society and any of its members. The fact that the appellant is a society does not automatically make the litigation a dispute within the meaning of s. 49 of the Co-operative Societies Act 1948.

[7] It was clearly wrong for the learned Judge to dismiss the application. It he considered that the dispute between the co-operative society and the member borrower should be resolved first, then the proper order to have been made would have been an order of stay.

[Appeal allowed.]

Cases referred to:
Bede Steam Shipping Company Ltd. v. Bunge Y Born [1927] 27 Lloyds' Law Report 410
Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors. (No. 2) [1983] 1 MLJ 412
Subramaniam v. Tan Lee Leng & Ors. [1980] 1 MLJ 171
M. Arulandan v. Malaysian Co-operative Insurance Society Ltd. [1987] CLJ (Rep) 44
Deccan Merchants Co-operative Bank Ltd. v. M/s. Dalichand Jugray Jain & Ors. [1969] AIR SC 1320

Legislation referred to:
Bombay Co-operative Societies Act VII of 1925, s. 54
Co-operative Societies Act 1948, ss. 49(2), (2)(c)
National Land Code 1965, s. 254
Rules of the High Court 1980, O. 83 r. 3

For the appellant - C.V. Das (John Matthew with him); M/s. Shook Lin & Bok
For the respondent - P.M. Mahalingam; M/s. Mahadevi Ganeshmurugan & Co.

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We allowed the appeal and stated we would give our reasons. We do so now.

The respondent (chargor) is the registered owner of a piece of land. She is the wife of Krishnadas Nair who is a member of a co-operative society registered under the Co-operative Societies Act 1948.

The appellant (chargee) granted a loan of RM100,000 on 23 March 1984 to Krishnadas Nair for a term of 2 years from the date of first drawdown at the interest rate of 14.5% per annum on monthly rests and the said interest rate was to be increased to 15% per annum on monthly rests from 1 September 1984. In order to secure the said loan the respondent on 13 October 1983 executed a first legal charge over the said land in favour of the appellant which charge was registered. By the term of the said charge the respondent agreed to pay to the appellant on demand the total amount outstanding together with interest and further default interest at the rate of 20% per annum on the amount in excess of the limit from the due date to final settlement. The respondent defaulted in the repayment of the loan together with interest. A notice in Form 16D under s. 254 of the National Land Code was sent to the respondent who acknowledged receipt.

It is not in dispute that the loan was taken by the respondent's husband for a housing scheme which had encountered some difficulties. It is also not in dispute that O. 83 r. 3 of the Rules of the High Court 1980 has been complied with. By originating summons dated 13 March 1986 the appellant sought, *inter alia*, for an order of sale of the said land by public auction.

Before the learned Judge Counsel for the respondent submitted that the respondent was not liable until the breach by the member of the co-operative society had been determined by a competent Court. Under s. 49(2) of the Co-operative Societies Act 1948 where a dispute has been referred to the Registrar-General he may (a) decide the dispute himself; (b) refer it for dispute to an arbitrator or arbitrators; or (c) require the parties concerned to refer the dispute

to a Court. The appellant has appealed to the Registrar-General who opted for s. 49(2)(c) and advised the parties concerned to take the matter to Court. The contention of the respondent is that until the breach by the member has been established any action against the respondent is premature.

Dato' N.H. Chan in a short judgment stated that:

> The chargor is in danger of losing his securing by an order of sale if the borrower is liable to pay the chargee for the loan. In the present case, the Registrar of Co-operative Societies has referred under s. 49(2)(c) the dispute between the member borrower and the co-operative society to the Court. Until that is resolved, the borrower is not liable to pay. And if the borrower is not liable to pay, the applicant chargor is similarly not liable.

The appellant appealed.

The respondent is not a member of any co-operative society. Her husband is such a member. The respondent charged her land as security for the loan given to her husband. The charge is in the usual form. When a charge is executed an independent obligation is created and is statutorily enforceable. The remedies of the appellant are covered by cl. 9 of the charge in the event of default. Proper statutory notice in Form 16D under s. 254 of the National Land Code was given to the respondent. In so far as the charge is concerned there is no dispute. Further, the respondent conceded that the money was due and payable. A mere refusal to pay or failure to pay money which is admittedly due does not create a dispute.

The matter of the charge is one under the National Land Code. We see no reason to resort to s. 49 of the Co-operative Societies Act 1948 which can in no way affect an independent obligation of a non member under a charge. The fact that there is a dispute between the co-operative society and a member borrower within the meaning of s. 49(2)(c) of the Co-operative Societies Act 1948 should not affect an action based on an independent obligation in respect of a non member. The respondent cannot take shelter under s. 49 which does not apply to her in her capacity as a chargor. The only defence of the respondent is that until the dispute between the member borrower and the co-operative society is settled the action against the respondent is premature. It was clearly wrong for the learned Judge to dismiss the application. If he considered that the dispute between the co-operative society and the member borrower should be resorted to first then the proper order to make is an order of stay.

Reference may be made to paras. 4, 5, 6 and 7 of her affidavit in reply:

> 4. Sometime on 19 March 1984 I entered into a loan agreement with the applicant's bank (hereinafter referred to as the said bank) as a chargor for a loan of RM100,000 to be granted to Mr. A. Krishnadass the borrower who is my husband.
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> 5. The sum of RM100,000 was released direct to Bernam Cahaya Sdn. Bhd., sometime on the same month by the said bank.
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> 6. The said Bernam Cahaya Sdn. Bhd., had used the said sum together with other sum or sums to finance part of the purchase price on land held under SLG 31085, Lot No. 1210, Mukim of Pulau Sebang, Alor Gajah Melaka consisting an area of 29 acres 0 roods 10 poles valued at RM1.750 million (hereinafter referred to as the said land) by Messrs. Jordan, Lee and Faafar the panel valuers. (See Exhibit marked "A").
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> 7. At the time of purchase of the said land, it was the intention of Bernam Cahaya Sdn. Bhd., to develop the said land to housing project, which would give a profit of RM4 million ringgit approximately for 371 units. If this scheme had gone the said bank would have been paid in full even before the said bank's demand notice.

It will be noted that what she has executed is not a loan agreement but a charge. She admitted the money was given and was used to purchase certain land for a housing project. In paras. 13 and 14 of her affidavit she blamed the Government of Malacca for the difficulties encountered by Bernam Cahaya Sdn. Bhd. One thing is clear, that is, the debt is never denied.

As for s. 49 of the Co-operative Societies Act 1948 the appellant contended that it affects members of a co-operative society but not outsiders. Also, the mere fact that the said section deems it to be a dispute does not affect independent obligation. A dispute in the statutory sense does not mean a denial of liability to pay. At common law the inability to pay is not regarded as a dispute. See *Bede Steam Shipping Company Ltd. v. Bunge Y. Born* [1927] 27 Lloyds' Law Report 410 at 413. Section 49 of the Co-operative Societies Act 1948 has been referred to in *Professor Dr. A Kanar Bador & Ors. v. N. Krishnan & Ors. (No. 2)* [1983] 1 MLJ 412; *Subramaniam v. Tan Lee Leng & Ors.* [1980] 1 MLJ 171; and *M. Arulandan v. Malaysian Co-operative Insurance Society Ltd.* [1987] CLJ (Rep) 44. These three cases dealt with members of the co-operative societies.

Counsel for the respondent conceded that the respondent's husband owed the appellant money. Both the respondent and her husband were merely asking for time. The respondent's husband could not obtain the loan without bringing in the respondent. It is her submission that the appellant has to overcome a hurdle in the nature of s. 49 of the Co-operative Societies Act 1948. The dispute has been referred to the Court. Until the dispute has been adjudicated by the Court the borrower member is not liable to pay. Similarly, the respondent is not liable to pay. Counsel for the respondent said the learned Judge took the right approach.

Counsel for the appellant urged the Court to follow the interpretation of the Indian Court on s. 49 as our Co-operative Societies Legislation was based on the Indian legislation which was taken from the English Friendly Societies Act 1922. The action against the respondent is in respect of a charge which has created an independent obligation. The right of redemption and the right of foreclosure are rights which only the Courts can give. Moreover, in this case the respondent (chargor) is not a member of the society concerned.

In *Deccan Merchants Co-operative Bank Ltd. v. M/s Dalichand Jugray Jain & Ors.* AIR [1969] Supreme Court 1320 & 1326 the Court in construing "dispute" under s. 54 of the Bombay Co-operative Societies Act 1925 the equivalent of our s. 49 stated:

> 23. One other limitation on the word "dispute" may also be placed and that is that the word "dispute" covers only those dispute which are capable of being resolved by the Registrar or his nominee. It seems to us very doubtful that the word "dispute" would include a dispute between a landlord society and a tenant when the landlord society has not been set up for the purpose of constructing or buying and letting out houses...
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> 24. This was the line of reasoning adopted by the House of Lords in *E.C. Mulkern v. James Lord* [1879] 4 AC 182 in holding that "proceedings in respect of accounts under a mortgage and sale of the property, which might include title to redemption or a judgment of foreclosure, were not such dispute between the society and a member, as the statutes (Friendly Societies Act (10 Geo. 4, s. 56) read with s. 4 of 6 and 7 Will, 4, c. 32) had contemplated.
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> Now before a case can fall under s. 54 (of the Bombay Co-operative Societies Act VII of 1925), it is not sufficient that there should be a dispute touching the business of the society. What is further required is that the dispute must be between the society and its member, and proper emphasis has got to be laid upon the expression "member" used in this section. The dispute must be between the society and the member as a member or quae a member. It must be a dispute in which the member must be interested as a member. It must relate to a transaction in which the member must be interested as a member.

In our case it is clear that the charge has created an independent obligation. Moreover, the respondent (chargor) is not a member of any co-operative society. Consequently, the provisions, particularly s. 49 of the Co-operative Societies Act 1948 do not apply to her. The fact that the dispute between the co-operative society and the member borrower has not been resolved is not good ground for saying that the respondent is not liable. Neither is it good ground for refusing to enforce the charge by the appellant. There is nothing to support the preposition that a chargor who is not a member of any co-operative society cannot be made liable until the dispute between the co-operative society and the member borrower has been resolved. It is against business efficacy. The respondent cannot resort to s. 49 which does not apply to her in any case to prevent the enforcement of a claim under a charge which is not in dispute.

This is an ordinary claim arising out of a charge. The claim would have been concluded as a matter of course but for the contention of the respondent that by virtue of s. 49 she is not liable until the dispute between the co-operative and the member borrower has been resolved.

In our view s. 49 has no application in the instant case. First, the respondent is not a member of the co-operative society. Secondly, the transaction between the appellant and the respondent does not create a dispute which only involves a society and a member. Thirdly, the charge creates a right on the part of the chargee in the event of default to pay to exercise the power of sale. Fourthly, only the Courts have the powers to make the order for sale. Fifthly, it is against business efficacy. No financial institution would like to deal with either a co-operative society or its members if s. 49 is invoked everytime there is a litigation. Moreover, it is not a dispute between a society and any of its members. The fact that the appellant is a society does not automatically make the litigation a dispute within the meaning of s. 49.

Also found at [1990] 1 CLJ 714